

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 33046

**COPIER WORD PROCESSING SUPPLY, INC.,**  
Plaintiff below/Appellant,

**FILED**  
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RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

v.

**WESBANCO BANK, INC., et. al.,**  
Defendants below/Appellee,

From the Circuit Court of Wood County,  
West Virginia  
Civil Action No. 03-C-472

**BRIEF *AMICI CURIAE* ON BEHALF OF THE  
WEST VIRGINIA ASSOCIATION OF COMMUNITY BANKERS, INC.  
AND  
WEST VIRGINIA BANKERS ASSOCIATION, INC.**

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*Basham v. General Shale*, 180 W. Va. 526, 377 S.E. 2d 830 (1988)

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### **West Virginia Statutes**

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W. Va. Code § 46-3-118 (2006)

W. Va. Code § 55-2-12 (2006)

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## I. STATEMENT OF INTEREST

The West Virginia Bankers Association ("WVBA") and the West Virginia Association of Community Bankers ("WVACB") each represent the interests of approximately eighty (80) federally-insured lending institutions in the State of West Virginia. Accordingly, this Court's rulings on the Certified Question presented will significantly impact the day-to-day business practices and expenses of members of the WVBA and the WVACB. The members of the WVBA and the WVACB have a vital interest in the Court's ruling on the Certified Question presented and wish to bring to the Court's attention important additional circumstances and policy concerns. The WVBA and the WVACB believe that their perspectives will be of assistance to this Court in the resolution of the matters before the Court.

**A. If the Court Does Not Uphold the Lower Court's Answers to the Certified Question, the Check Payment System Will Be Severely Disrupted and the Negotiability of Commercial Paper Adversely Affected.**

Negotiable instruments or commercial paper, and in this case specifically, checks, have long played an important role in commerce as representing one of several payment systems. Checks are used as a means for one person to make payment of funds to another person.<sup>1</sup> Banks function as critical components of this payment system. Importantly, "banks hold the checking deposits that serve as the nation's principal form of money . . . Banks together with the 12 Federal Reserve Banks, provide the payment system – the means by which checking deposits are conveniently moved from one person to another (by checks and other methods) to pay for goods,

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<sup>1</sup> In 2003 alone, 36.7 billion paper checks were paid and written. See, *Law of Bank Deposits, Collections and Credit Cards*, Clark, Barkley, Clark, Barbara, at 1-48 (7/2005).

services and investments.” *Matthew Bender & Co., Banking Law*, Vol. 3 § 80.02. Article 3<sup>2</sup> of the Uniform Commercial Code (the “UCC”) sets forth detailed requirements for the negotiation of checks, their transfer, and the rights and obligations of various parties, including loss allocation. One purpose of Article 3 is to provide predictability and finality in commercial transactions involving checks. This facilitates payment and encourages the acceptance of negotiable instruments as the functional equivalent of cash.

The restructuring or reordering of the UCC in West Virginia that would result from a decision to apply an equitable tolling doctrine would be highly disruptive to the functions of the payment system. A significant disruption of this system would impose serious hardship on consumers and businesses, with harmful even cumulative effects throughout the economy. *Id.* In the payment system, each instrument, once negotiated, flows separately and distinctly through the collection and final payment process. Rights and obligations on the instrument attach, or arise, on an instrument based on its method of transfer and collection. These rights and obligations are inter-dependent and in some cases, based on a cause and effect structure. Transfer of instruments creates new rights and, in some cases, new responsibilities. Application of the continuous tort doctrine would alter the essential interdependence of a fairly complex and structured code which works effectively in billions of check transactions occurring each day. It would affect the entire structure of the UCC in West Virginia and raise uncertainty as to the liability on instruments which flow through West Virginia, thereby creating an anomaly for our State and other jurisdictions through which our instruments must pass.

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<sup>2</sup> Article 3 underwent major revisions in 1990, generally to the benefit of banks in check fraud cases in order to reflect the automated environment in which check collection now takes place. *Id.*, at 1-47.

A Michigan appeals case observed that the UCC is a “highly integrated body of statutes . . . .” *See, Merrill Lynch Pierce Fenner & Smith, Inc. v. Fakib*, 200 Mich. App. Lexis 689 (Mar. 11, 2004). A New York appellate case stated that the promulgation of the UCC was a process, pursuant to which the “risk of loss in commercial matters has been attempted to be adjusted in a fair and equitable manner . . . establishing rules of liability that are generally based not on actual fault [tort law concepts] but on allocating responsibility to the party best able to prevent the loss by the exercise of care, the UCC not only guides commercial behavior but increases certainty in the marketplace and efficiency in dispute resolution . . . (citations omitted) [the objective of the UCC is] promoting certainty and predictability in commercial transactions . . .” *Call v. Ellenville Nat’l Bank*, 774 N.Y. S.2d 76 (2004). Moreover, the UCC allocates liability to the party best able to prevent the loss by exercise of reasonable care.<sup>3</sup> Ordering of rights, predictability of liability and speed of transfers are essential underpinnings of the UCC in everyday commerce. These underpinnings are substantially vitiated by the adoption of either equitable tolling doctrine advocated by the Appellant and accordingly, should be rejected by the Court.

Thus ,while construing the Certified Question, the Court should bear in mind the purposes and objectives of Article 3 of the UCC. A finding that the equitable concept of a continuing tort applies to the statute of limitations for conversion would be a significant departure from the weight of authority in the United States. The laws affecting checks and

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<sup>3</sup> For example, Section 46-3-405 of the UCC adopts the principle that the risk of loss for fraudulent indorsements by an employee entrusted with responsibility for handling checks should fall on the employer rather than the bank that takes the check or pays it. *See*, Official Comment 1, W. Va. Code §46-3-405. The employer is in a better position to avoid the loss by exercising care in choosing and supervising employees, and adopting other measures to prevent such fraud. *Id.*

governing negotiable instruments must remain uniform, otherwise the use of checks as a viable payment system would be severely impaired.

## II. CERTIFIED QUESTION

The WVBA and the WVACB will address the questions which were answered by the Circuit Court of Wood County (the "Circuit Court") as follows:

**Question:** In a case governed by the three (3) year limitation period provided for in W.Va. Code § 46-3-118(g):

1. Does the continuing tort theory apply to the alleged conversion of multiple, separate negotiable instruments made payable to the plaintiff's business by an employee of plaintiff to her personal checking account at defendant bank over a period of several years, such that the cause of action accrues at, and the statute of limitation does not begin to run until, the date of the alleged conversion of the last negotiable instrument, permitting damage claims for instruments allegedly converted more than three years prior to the filing of the complaint, or
2. Does the cause of action accrue and the limitations period run from the date of the negotiation of each separate instrument permitting damage claims only for such instruments allegedly converted within such three year period prior to the filing of the complaint?

**Answer:**

1. No
2. Yes



### III. STATUTE INVOLVED

W.Va. Code 46-3-118(g) provides as follows:

(g) Unless governed by other law regarding claims for indemnity or contribution, an action (i) for conversion of an instrument, for money had and received, or like action based on conversion, (ii) for breach of warranty or (iii) to enforce an obligation, duty, or right arising under this article and not governed by this section must be commenced within three (3) years after the cause of action accrues. (1993, c. 166.)

### V. ARGUMENT

**A. The Plain Language and History of Section 46-3-118(g) Demonstrate That the Continuous Tort Theory Was Not Intended To Be and Should Not be Applied**

The first part of the Certified Question asks whether the continuing tort theory applies to the alleged conversion of multiple separate negotiable instruments over a period of several years, such that the cause of action accrues at, and the statute of limitations does not begin to run until the date of the alleged conversion of the last negotiable instrument, permitting damage claims for instruments allegedly converted more than three (3) years prior to filing of the complaint.

The plain language of Section 46-3-118(g) supports Appellee's argument that a separate cause of action for a series of converted checks accrues for each check. In particular, Section 46-3-118(g) provides that:

(g) Unless governed by other law regarding claims for indemnity or contribution, an action (i) for conversion of an instrument, for money had and received, or like action based on conversion, (ii) for breach of warranty or (iii) to enforce an obligation, duty, or right arising under this article and not governed by this section must be commenced within three years after the cause of action accrues. (1993, c.166.) (emphasis added)

As noted, the 1990 version of Article 3 of the UCC, adopted by West Virginia in 1993, expressly uses the words “an instrument”. W. Va. Code § 46-3-118(g) (2006). Thus, a cause of action for conversion is not tolled until the last check is forged, as Appellant contends. Rather, rights and obligations on each converted check arise at the time of payment.

Adoption of either the discovery rule or the continuing tort theory also runs contrary to other major and well-respected treatises on payment systems. “The statute of limitations on an action for conversion of an instrument expires three years after the cause of action accrues. The cause of action accrues when the act of conversion occurred. In the case of a payor, the cause of action accrues on the date of payment. The statute is not tolled because the owner is ignorant of the conversion.” *Lary Lawrence, An Introduction to Payment Systems*, p. 242 (1997). For a similar decision and survey of the multitude of jurisdictions following this majority view, see *Henry J. Bailey & Richard B. Hagedorn, Brady on Bank Checks, The Law of Banks Checks*, ¶ 30.12[2] (Rev. Ed. 2006).

Finally, the goal of Article 3 of the UCC, when revised in 1990 and adopted by West Virginia in 1993, was to “clear up conflicting interpretations and incorporate desirable substantive improvements to take into account technological developments and changes in business practices.” See, *1990 Official Text* <sup>4</sup> It is an elemental principle that the “rights, duties

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<sup>4</sup> The history of changes to Article 3 reflected in the adoption of the 1990 version adopted in this state in 1993 also support Appellee’s position. The precursor to the Uniform Commercial Code was the Uniform Negotiable Instruments Law, first published in 1896 by the National Conference of Commissioners on Uniform State Laws (N.C.C.U.S.L.), that by 1940 had been adopted in all states. The first version of the Uniform Commercial Code was promulgated by a joint effort of N.C.C.U.S.L. and the American Law Institute in 1951. This version was modified in 1957 and 1958, with other minor changes made in 1962. This Code was enacted by 1968 in all states except Louisiana (that subsequently enacted it). Matthew Bender & Co., *Banking Law*, Vol. 5 §11.01.

This version of the UCC stood for some 30 years, until 1990 when N.C.C.U.S.L. adopted the 1990 Official Text at its annual conference in August 1991. The 1990 Official Text represents the

and liabilities of banks and customers" with respect to instruments are provided for in Article 3, among others. Until adoption of this revised version of Article 3, the UCC did not provide a comprehensive statute of limitations for negotiable instruments. *See, Law of Bank Deposits, Collections and Credit Cards, Clark, Barkley, Clark, Barbara*, at 1-48 (7/2005). Adopting Appellant's argument would represent a step backward for the State of West Virginia, leaving it to operate under a different set of legal rules than other states around this country.

**B. The Continuing Tort Doctrine Should Not Apply Because This Case Is Distinguishable From The West Virginia Case Applying The Continuing Tort Doctrine And Such Cases Do Not Involve Transactions Governed By The UCC**

Appellant cites several West Virginia cases to support its position that the continuing tort doctrine applies to the UCC. However, Appellant's attempt to expand the UCC statute of limitations in this case beyond its stated three-year period fails for several reasons. First, the cases cited by Appellant from this jurisdiction generally involve repeated, additional, recurring injury to one item of property, usually a tract of real estate. Such circumstances are completely distinguishable from the circumstances in this case involving separate checks, which are each separate and distinct items of property for which the individual act of conversion is complete when the individual check was negotiated by Appellant's employee. Additionally, Appellant ignores the fact that its action is brought pursuant to the UCC as opposed to the common law of this State, and deference to the uniform application of such statutes among the several states should be afforded as discussed in the authorities cited and discussed below.

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culmination of several years of effort by various committees and institutions to redraft and modernize Articles 3 and 4. This effort dates back to a 3, 4, 8 Committee created by the Permanent Editorial Board of the Uniform Commercial Code which, at first, conceptually conceived of the drafting of a "new payments code." Eventually, this effort was abandoned and succeeded by a drafting committee of N.C.C.U.S.L. The result of the N.C.C.U.S.L. effort was the adoption of the 1990 Official Text. *Id.*

In particular, Appellant relies on the case of *Taylor v. Culloden Public Service Dist.*, 214 W. Va. 639, 591 S.E. 2d 197 (2003), in furtherance of its argument that the continuing tort theory expands the statutory period of limitations to permit Appellant to seek recovery for conversion of checks which allegedly occurred more than three (3) years prior to the filing of the complaint in the court below. A careful reading of *Taylor, supra*, reveals that such reliance is decidedly misplaced. *Taylor* is a reiteration of longstanding authority in this jurisdiction that causes of action for distinct tortious events resulting in separate identifiable damages occurring within the statutory period of limitations are not barred simply because other similar events, including the first of such series of events, occurred outside the statutory period of limitations and, accordingly, for which claims are barred. *State ex rel. Cutlip v. Sawyers*, 147 W. Va. 687, 130 S.E. 2d 345 (1963); *Fullmer v. Swift Energy Co., Inc.*, 404 S.E. 2d 534 (W. Va. 1991); *De Rocchis v. Matlock, Inc.*, 194 W. Va. 417, 460 S.E. 663 (1995). Indeed, footnote 21 of *Taylor, supra*, is particularly instructive in such regard in stating as follows:

While the issue of recoverable damages is not properly before us, we note that the damages that the Balls can recover in connection with a temporary nuisance are limited to the two-year period in time prior to the filing of their cause of action. *See generally, State ex rel. Cutlip v. Sawyers*, 147 W. Va. 687, 691, 130 S. E. 2d 345, 348 (1963). We further observe that successive actions can be filed to recover additional damages for temporary nuisances that occur subsequent to the filing of the initial nuisance suit.

*Id.*, 591 S. E. 2d 197, 205. The two-year period referenced is that of the general tort statute of limitations for property damages, W. Va. Code § 55-2-12, discussed in such case. Such authority is entirely consistent with Appellee's position on the issue of application of the statute of limitations in this case and the nature of conversion of negotiable instruments and damages

therefrom as being distinct and complete upon the negotiation of each instrument as discussed in the authorities cited and discussed below.<sup>5</sup>

**C. The Sole Authority Cited by Appellant To Support Adoption Of The Continuing Tort Doctrine Is From A Jurisdiction Which Has Not Fully Accepted the Doctrine and Does Not Uniformly Follow the Doctrine**

Additionally, the sole authority cited by Appellant to support adoption of the continuing tort doctrine is a single case from Illinois, a jurisdiction which has not fully accepted the doctrine and does not uniformly follow the doctrine. *See generally, Haddad's of Illinois, Inc. v. Credit Union 1 Credit Union*, 678 N.E.2d 322 (Ill. App. 1997); *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill.2d 325, 264, 770 N.E.2d 177, 191 (2002).

No other state supreme court has adopted this doctrine in the context that Appellant requests. Moreover, in the case of *Rodrigue v. Olin Employees Credit Union*, the United States Court of Appeals for the Seventh Circuit, which is the federal judicial circuit that includes the State of Illinois, was faced with a situation remarkably similar to the present situation. In that case, an employee of a physician stole some 269 insurance reimbursement checks payable to her employer and fraudulently endorsed the checks over to herself prior to presenting them to her credit union for deposit. *See, Rodrigue v. Olin Employees Credit Union*, 406 F.3d 434 (7<sup>th</sup> Cir. 2005). The Seventh Circuit predicted that the Illinois Supreme Court would not adopt the continuing violation rule or continuing tort theory. *See, Id.* at 447. In

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<sup>5</sup> Significantly, Appellee does not seek to bar Appellant's cause of action in its entirety because some transactions occurred prior to three (3) years before the filing of the complaint as was the position espoused by Appellee in at least some of the authority cited by Appellant. In this action, Appellee seeks to bar only those transactions occurring prior to such three-year period ending when Appellant filed its complaint in the court below. Such position is supported by the general tort law of this State as noted above.

making this prediction, the Seventh Circuit reasoned that the cases where the Supreme Court of Illinois had previously deemed application of the continuing tort theory appropriate in the past all involved situations arising "not from individually identifiable wrongs but rather from a series of acts considered collectively," such as situations involving repeated intentional infliction of emotion distress and continuing unbroken treatment situations involving medical malpractice. *See, Id.* at 442-43. By contrast, the Seventh Circuit observed that the Supreme Court of Illinois expressly declined to adopt the continuing violation rule in the *Belleville Toyota, supra*, case, which involved a continuing series of violations of the Illinois Motor Vehicle Franchise Act (the "Illinois Act"), each violation of which was separately actionable under the Illinois Act. *See, Id.* (further citations omitted). Given that each violation of this Act was a separately identifiable wrong and separately identifiable cause of action under this Act, the Supreme Court of Illinois declined to adopt the continuing violation rule to expand the statute of limitations period provided by this Act. *See, Id.*

The *Rodrigue* Court reasoned that, like the violations of the Illinois Act in *Belleville Toyota*, conversion of a check is a statutorily-provided cause of action under the UCC, and each separate conversion constitutes an independent violation of the UCC and an independent cause of Action by stating as follows:

Whether [Plaintiff's Employee] managed to negotiate hundreds of checks over an 85-month period is irrelevant insofar as [Plaintiff's] right or ability to sue for conversion. Whether [Plaintiff's Employee] had negotiated one check or 1000, [Plaintiff] had a valid cause of action for conversion; nothing about the repeated or ongoing nature of [Plaintiff's Employee's] conduct affected the nature or validity of [Plaintiff's] suit, beyond increasing [Plaintiff's] damages. Moreover, in contrast to a claim that arises from a cumulation of wrongful acts, a claim for conversion does not pose undue difficulty for the victim in identifying the nature, origin, and extent of her injury.

*Rodrigue*, 406 F.3d at 443.

The same reasoning holds true in the instant case. Each conversion of each check by Appellant's employee constituted an independent and separate cause of action for conversion under the statute. The number of checks negotiated by Appellant's employee does not change this fact. The number of checks negotiated by Appellant's employee did not make discovery of her acts by Appellant more or less difficult. Similar to the authority from the State of Illinois cited in *Rodrigue*, the West Virginia authority relied upon by the Appellant involves claims that arises as a result of a cumulation of conduct not able to be measured individually in the abstract, not a series of separately identifiable transgressions. Each conversion of each check by Appellant's employee constituted a separately identifiable cause of action under the UCC and should be regarded as such for determination of the appropriate statute of limitations period.

**D. The Rationale For Adoption Of The Continuing Tort Theory Is Contrary To The Underlying Law Governing Conversion Of Negotiable Instruments Under the UCC And Contrary To The Policy Behind the Adoption of the UCC**

The rationale used by the Seventh circuit in *Haddad's of Illinois, Inc.*, the case that Appellant cites in asking this Court to adopt the continuing tort theory, fails when placed under scrutiny. The passage cited by the Appellant provides, in part, that: "[w]hen a series of checks is cashed as part of an ongoing scheme or plan, the plan constitutes a single transaction...." *Haddad's of Illinois, Inc.*, 678 N.E.2d at 324. This line of reasoning, that a series of checks converted by a singular wrongdoer constitutes a single transaction, runs contrary to the law governing conversion of negotiable instruments. W. Va. Code § 46-3-420 provides that "[a]n instrument is also converted if it is taken by transfer . . . from a person not entitled to enforce the instrument...." W. VA. Code § 46-3-420 (2005). The plain text of this statute confirms why the

overwhelming majority of jurisdictions which have held that "[e]ach instance of conversion is a discrete and actionable wrong." *Rodrigue*, 406 F.3d at 447. Permitting application of the continuing tort theory to toll the statute of limitations by reasoning that a series of converted checks by the same wrongdoer "constitutes a single transaction" runs contrary to the plain text of the conversion statute itself along with an overwhelming majority of other jurisdictions.

Applying the continuing tort doctrine to toll the statute of limitations for negotiable instruments also runs contrary to the very policy behind the adoption of Article 3 of the UCC. This rationale is based upon two (2) primary principles, as discussed by the Supreme Court of Tennessee in the case of *Pero's Steak and Spaghetti House v. Lee*:

First is the commercial policies underlying the Uniform Commercial Code that militate strongly against open-ended liability on negotiable instruments. As the Third Circuit explained: "[T]he utility of negotiable instruments lies in their ability to be readily accepted by creditors as payment for indebtedness. Checks must be transferable. Consequently, 'in structuring the law of checks, we . . . seek to enhance the negotiability of commercial paper so that it may play its role as a money substitute.'" *Robert Hillman, et al., Common Law and Equity Under the Uniform Commercial Code*, ¶ 14.01[1] (1985). Negotiability requires predictable and rapid collection through payment channels.' Closely related to negotiability are commercial finality and certainty. "The finality of transactions promoted by an ascertainable definite period of liability is essential to the free negotiability of instruments on which commercial welfare so heavily depends.

*Pero's Steak And Spaghetti House v. Lee*, 90 S. W. 3d 614, 622-23 (Tenn. 2002). These well-reasoned and well-placed policies behind the adoption of the UCC are completely ignored by application of the continuing tort theory or discovery rule. It is for this reason that an overwhelming majority of jurisdictions have refused to adopt either the continuing tort theory or the discovery rule to allow for the tolling of the statute of limitations in a negotiable instrument



conversion action. It is yet another reason why the Court should refuse to allow the adoption of the continuing tort doctrine to the instant case.

**E. Other Jurisdictions Refuse to Apply The Continuing Tort Doctrine Or Any Other Equitable Doctrine To Cases Of Conversion Of Negotiable Instruments, But Rather Strictly Apply The Applicable Statutes Of Limitations**

The second part of the Certified Question asks whether the cause of action accrues and the limitation period run from the date of the negotiation of each separate instrument permitting damage claims only for such instruments allegedly converted within such three (3) year period prior to the filing of the complaint in the Circuit Court. The overwhelming weight of authority from other jurisdiction indicates that the cause of action accrues and the limitation period runs from the date of the negotiation of each separate instrument.

Although the continuing tort theory and discovery rule operate in distinctly different ways, "the two rules are allied in their underlying rationales." *Rodrigue*, 406 F.3d at 444. Accordingly, while the Appellant has waived application of the discovery rule in the instant case, the same rationale and policy considerations that have been used by courts to decline to follow the discovery rule should apply to the continuing violation rule. While such cases directly hold the discovery rule inapplicable to cases such as the one at bar, the facts of several of these cases involved longstanding schemes, claims for which were held to be barred in part by the applicable statute, whereas application of the continuing tort doctrine would have permitted a cause of action to be pursued for all transactions involved in such cases regardless of application of the discovery rule.<sup>6</sup> *See, Pero's Steak And Spaghetti House v. Lee*, 90 S. W. 3d 614 (Tenn.

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<sup>6</sup> Appellant has waived any application of the discovery rule in this case. *See*, Plaintiff's Reply Brief, footnote 2, page 4. However, the rational of the decisions cited herein by defendant involving the

2002); *Menichini v. Grant*, 995 F. 2d 1224 (3<sup>rd</sup> Cir. 1993); *Kuwait Airways Corp. v. American Security Bank*, 890 F. 2d 456 (D.C. Cir. 1989); *Stefano v. First Union Nat'l Bank of Virginia*, 981 F. Supp. 417 (E.D. Va. 1997). Additionally, in *Smith v. Franklin Custodian Funds, Inc.*, 726 So. 2d 144 (Miss. 1998), although only one transaction was involved, the court expressly refused to apply the continuing tort doctrine to the continuing concealment of such transgression and thereby extend the statute. *Id.*, at 148, 149. Furthermore, several other cases, even though not involving either factually or by assertion the issue of continuing tort, emphasize the nature of the act of conversion of a negotiable instrument as being complete for an instrument when wrongful dominion is exercised over such instrument or it is paid on a forged endorsement. *Palmer Mfg. and Supply, Inc. v. Bank Ohio Nat'l Bank*, 637 N.E. 2d 386 (Ohio Ct. App. 1994); *Insurance Co. of North Am. v. Manufacturers Bank of Southfield*, 338 N.W. 2d 214 (Mich. Ct. App. 1983); *Wang v. Farmers State Bank of Winner*, 447 N.W. 2d 516 (S.D. 1989); *Continental Casualty Company v. Huron Valley Nat'l Bank*, 271 N.W.2d 218 (Mich. 1978); *Fuscellaro v. Industrial Nat'l Corp.*, 368 A. 2d 1227 (R.I. 1977). Other cases which strictly apply statutes of limitations denying applicability of the discovery rule or other theory of equitable tolling are as follows: *Yabro, Ltd. v. Missoula Federal Credit Union*, 50 P. 3d 158 (Mont. 2002); *First Investment Corp. v. Citizens Bank, Inc.*, 757 F. Supp. 687 (W.D. N.C. 1991), *aff'd without published opinion* at 956 F. 2d 263 (4<sup>th</sup> Cir. 1992); *Husker News Co. v. Mahaska State Bank*, 460 N.W. 2d 476 (Iowa, 1990); *Estate of Hollywood v. First Nat'l Bank of Palmerton*, 859 A. 2d 472 (Pa. 2004).

In *Pero's Steak And Spaghetti House, supra*, the court noted the super majority of cases that strictly apply statutes of limitations in cases of conversion of negotiable instruments

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discovery rule is equally applicable to Appellant's argument that the continuing tort doctrine expands Appellant's cause of action.

and refuse to adopt the discovery rule, *Id.*, at 622, and discussed the rationale for such holdings as follows:

The majority view is primarily grounded upon two principles. First is the commercial policies underlying the Uniform Commercial Code that militate strongly against open-ended liability on negotiable instruments. As the Third Circuit explained:

The utility of negotiable instruments lies in their ability to be readily accepted by creditors as payment for indebtedness. Checks must be transferable. Consequently, "in structuring the law of checks, we . . . seek to enhance the negotiability of commercial paper so that it may play its role as a money substitute." *Robert Hillman, et al., Common Law and Equity Under the Uniform Commercial Code*, P. 14.01[1] (1985). Negotiability requires predictable and rapid collection through payment channels.

Closely related to negotiability are commercial finality and certainty. "The finality of transactions promoted by an ascertainable definite period of liability is essential to the free negotiability of instruments on which commercial welfare so heavily depends." *Fuscellaro v. Industrial Nat'l Corp.*, 117 R.E. 558, 368 A. 2d 1227, 1231 (1977); [statutory citation omitted].

The Code drafters sought quick and inexpensive resolution of commercial disputes. This overarching goal is particularly important with negotiable instruments where the exigencies of commerce require inexpensive, quick, and reliable transfer of funds. When the only legally significant temporal events are the time of injury and the time of filing, the issue whether the statute of limitations bars an action becomes a relatively simple determination capable of resolution on the basis of judicial pleadings.

*Menichini*, 995 F. 2d at 1230-31; see also *Haddad's of Illinois, Inc.*, 678 N.E. 2d at 326 ("The use of negotiable instruments was intended to facilitate the rapid flow of commerce. This policy is best served by finding the accrual of a cause of action for conversion of negotiable instruments occurs when the instrument is negotiated."); *Husker News Co.*, 460 N.W. 2d at 479 ("Strict application of the limitation period, while predictably harsh in some cases, best serves the twin goals of swift resolution of controversies and 'certainty of liability' advanced by the [Code].").

The second reason often cited by courts adopting the majority view is that a claim for conversion of negotiable instruments is unlike other

claims to which the discovery rule has been applied. For example, the discovery rule generally has been applied where the actual injury does not manifest itself until years after the tortious conduct occurred and long after the statute of limitations expired. *Qualify Auto Parts Co. Inc.*, 876 S.W. 2d at 822. In contrast, the tort of conversion is complete and the injury occurs at the moment the tortfeasor appropriates the plaintiff's property to his or her own use or benefit by exercising dominion over it in violation of the true owner's right. See *Barger v. Webb*, 216 Tenn. 275, 391 S.W. 2d 664, 665 (Tenn. 1965); *General Electric Credit Corp. of Tennessee v. Kelly & Dearing Aviation*, 765 S.W. 2d 750, 753 (Tenn. Ct. App. 1988). When the property converted is a negotiable instrument, the damage is done, and the tort is complete when the instrument is negotiated, regardless of the plaintiff's ignorance of the conversion. See, e.g., *Menichini*, 995 F. 2d at 1230-31; *Kuwait Airways Corp.*, 890 F. 2d at 462; *Haddad's of Illinois, Inc.*, 678 N.E. 2d at 326; *Yarbro, Ltd.*, 50 P. 3d at 163. Moreover, the law of conversion presumes that property owners know what their assets are and where they are located. See, e.g., *Fuscellaro*, 368 A. 2d at 1231. The law therefore presumes that the plaintiff is not ignorant of the conversion. Unlike other situations in which the discovery rule has been applied, persons alleging conversion, and particularly conversion of a negotiable instrument, generally should be able to easily and quickly detect the loss and take appropriate action. Having considered the authority, we agree with the Iowa Supreme Court's assessment:

As tempting a choice as that may be in an individual case [applying the discovery rule], we think the public would be poorly served by a rule that effectively shifts the responsibility for careful bookkeeping away from those in the best position to monitor accounts and employees. Strict application of the limitations period, while predictably harsh in some cases, best serves the twin goals of swift resolution of controversies and "certainty of liability" advanced by the [Uniform Commercial Code].

*Husker News Co.*, 460 N.W. 2d at 479; see also *Menichini*, 995 F. 2d at 1230-31; *Kuwait Airways Corp.*, 890 F. 2d at 462; *Haddad's of Illinois, Inc.*, 678 N.E. 2d at 326; *Habro, Ltd.*, 50 P. 3d at 164; *Palmer Mfg. & Supply, Inc.*, 637 N.E. 2d at 390-91; *Fuscellaro*, 368 A. 2d at 1231.

*Id.*, at 623, 624.<sup>7</sup> Furthermore, the court, in *Menichini, supra*, stated in regard to its strict application, "We find this approach convincing and believe it advances the Code objectives of negotiability, finality and uniformity in commercial transactions." *Id.*, at 1230.

Such rationale is equally applicable to discussion of the continuing tort theory as it is to the discovery rule. Moreover, the fact that the continuing tort theory was apparently not even discussed in the above-cited cases where it could have been argued to expand, at least in part, the plaintiff's claims is itself instructive.

The foregoing summary points out the destructive effect of the use of a tolling period in conversion cases under the UCC. The basic fabric of the UCC is that each negotiable instrument is a separate and distinct item which creates statutory rights and responsibilities among the parties who handle it. Each party involved in each instrument has independent rights and responsibilities which necessarily relate to how they are structured under the UCC. A series of converted instruments involving a single wrongdoer could have widely differing ramifications even among similarly-situated parties depending on how each instrument is negotiated or transferred. Thus, rights and responsibilities must be measured in finite periods to ensure predictability and finality in commercial transactions. Altering an essential underpinning of the UCC would disrupt the primary purpose of the UCC in ordering instruments in interstate commerce.

While West Virginia has not decided any cases on point,<sup>8</sup> the case of *Basham v. General Shale*, 180 W. Va. 526, 377 S.E. 2d 830 (1988) wherein this Court refused to apply the

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<sup>7</sup> The distinct minority of cases applying the discovery rule cited in *Pero's Steak and Spaghetti House, supra*, at page 622, are not instructive to this analysis and are not discussed.

discovery rule to the limitation provisions of Section-2-725(2) of the West Virginia Code, indicates that, at least generally, the jurisprudence of this State will strictly apply UCC limitation periods consistent with the above discussion.

Accordingly, given the overwhelming majority of cases which strictly apply applicable statutes of limitation to cases involving conversion of negotiable instruments and the desire for commercial certainty and uniformity which forms the basis of such decisions, Appellant's claims pertaining to deposit transactions more than three years prior to the filing of its complaint on October 6, 2003, are barred by Section 46-3-118(g) of the West Virginia Code.

## V. CONCLUSION

The WVBA and the WVACB urge the Court to consider the important additional circumstances and policy concerns set forth herein when it answers the Certified Question presented. The Court below answered the Certified Question correctly when it found that the

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<sup>8</sup> Although there are no decisions from any court in West Virginia ruling on the continuing tort theory as it applies to commercial conversion actions, there is one recent opinion in a case from the Southern District of West Virginia ("District Court"), wherein Judge Goodwin predicted, in declining a defendant bank's motion for summary judgment, that the West Virginia Supreme Court of Appeals would adopt the discovery rule in the context of a commercial conversion case even though it represents the minority rule. *See generally, C&L Construction Co., Inc. v. BB&T Corp.*, 2005 WL 2792401 (S.D.W. Va. 2005). There is a Motion for Reconsideration currently pending regarding this Order. The District Court's rationale in so deciding this issue is that the West Virginia Supreme Court of Appeals, in the case of *Public Citizen, Inc. v. First Nat'l Bank of Fairmont*, 198 W.Va. 329, 480 S.E.2d 538, found the complaint in that case to be timely filed and, although the discovery rule was not discussed in anyway in the case, the District Court implicitly supported adoption of the same by finding the complaint in the matter to be timely filed.

Although the Appellant in this case has waived application of the discovery rule, so its ramifications in this case are irrelevant to the current matter, it should be noted that this line of reasoning in this decision is faulty. *Public Citizen* was decided prior to the date that the 1990 revisions to UCC Article 3 were adopted by the State of West Virginia, and the prior version of Article 3 that controlled when this case was decided did not contain the present statute of limitations for conversion actions found in W. Va. Code § 46-3-118(g). Accordingly, a finding in *Public Citizen* by the West Virginia Supreme Court that a complaint at that time was filed on a timely basis, for whatever reason, could not possibly have been an implicit recognition of the discovery rule under the current statute of limitations that did not even exist in West Virginia when *Public Citizen* was decided.

cause of action accrues and the statute of limitations period runs from the date of the negotiation of each separate instrument permitting damages claims only for such instruments allegedly converted within such three-year period prior to the filing of the complaint. This conclusion is supported by the weight of authority. It also promotes the important policies of finality and certainty in the negotiability of instruments. For these reasons, the Court should exercise restraint in answering the Certified Question.

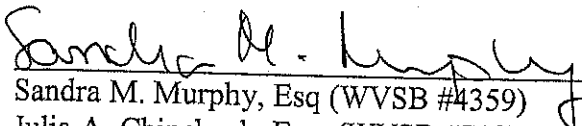
Respectfully submitted this 5th day of May, 2006.

THE WEST VIRGINIA BANKERS  
ASSOCIATION, INC.

By Counsel

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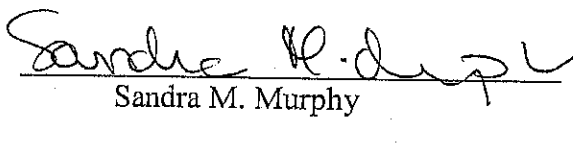
## CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on the 5th day of May, 2006, she served a true and exact copy of the BRIEF AMICI CURIAE ON BEHALF OF THE WEST VIRGINIA ASSOCIATION OF COMMUNITY BANKERS, INC. AND WEST VIRGINIA BANKERS ASSOCIATION, INC. via the United States mail, first class postage prepaid, and addressed as follows:

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